

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAUNTELL AVERY PERRY,

Defendant-Appellant.

UNPUBLISHED

May 31, 2007

No. 269097

Wayne Circuit Court

LC No. 05-011169-01

Before: White, P.J., and Saad and Murray, JJ.

PER CURIAM.

Defendant was convicted after a bench trial of armed robbery, MCL 750.529. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

At trial the evidence revealed that defendant grabbed Golden Davis' designer glasses off of his face on October 14, 2005. When Davis attempted to get his glasses back, defendant outstretched his arm and pointed a gun at Davis. Davis's friend, Frenchy, observed the armed robbery.

At the final conference on December 2, 2005, the prosecution served a copy of its witness list upon defense counsel. The prosecution's witness list contained the first names of several res gestae witnesses but did not list those witnesses' last names, addresses, or phone numbers. On December 22, 2005, the trial court received a request by defendant, pursuant to MCL 767.40a(5), for the prosecution's assistance in producing the res gestae witnesses it had listed. In a discovery order dated December 14, 2005, yet signed December 22, 2005, the trial court granted defendant's request and required the prosecution to disclose the full names, addresses, and telephone numbers of the res gestae witnesses listed on the prosecution's witness list.

By the start of trial on January 20, 2006, the prosecution had yet to comply with the court's earlier discovery order, stating that it had unsuccessfully attempted to contact Davis in order to find Frenchy. The court denied defendant's request for an adverse instruction and stated that if the prosecution did not produce Frenchy within a week then it would consider an adverse instruction.

Upon Frenchy's absence at trial on January 27, 2006, the trial court found that the prosecution used due diligence in its efforts to locate Frenchy.

Defendant raises several claims of ineffective assistance of counsel on appeal. Whether a defendant was denied the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). We review the trial court's factual findings for clear error and review its constitutional determination de novo. *Id.* A finding is clearly erroneous where, after reviewing the entire record, a definite and firm conviction is left that a mistake has been made. *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003). Under de novo review, we give no deference to the trial court. *People v Howard*, 233 Mich App 52, 54; 595 NW2d 497 (1998).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 326-327; 521 NW2d 797 (1994). The defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms. *Strickland*, *supra* at 687-688; *Pickens*, *supra* at 312-313. Second, the defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's errors the outcome would have been different. *Strickland*, *supra* at 687-688; *Pickens*, *supra* at 309; *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

We hold that defendant was not denied the effective assistance of counsel. First, defense counsel filed her discovery request well within the guidelines stipulated by statute and, therefore, did not render deficient performance in doing so. See MCL 767.40a(5). Second, although defendant contends that he was denied the effective assistance of counsel when his trial counsel conceded his guilt on the felony-firearm count in her motion for a directed verdict, defendant was found not guilty on the felony-firearm charge. The issue is therefore moot. See *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). Third, defendant was not denied the effective assistance of counsel when, after the prosecution failed to produce Frenchy at trial, defense counsel moved for an adverse instruction rather than dismissal. The trial court considered counsel's request, apparently rejected consideration of an adverse inference, and convicted defendant. Because the trial court considered the request, rejected it and found the facts to be as presented by the prosecution, defendant has not shown that he was prejudiced by counsel's performance and therefore is not entitled to relief. Cf. *People v Gunnett*, 182 Mich App 61; 451 NW2d 863 (1990).

Defendant next argues he was denied the effective assistance of counsel because defense counsel offered no defense theory other than the credibility of the victim, which counsel never impeached. The decision whether to impeach the credibility of a witness is a matter of trial strategy that we will not second-guess on review. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). In any event, defense counsel did in fact attempt to impeach Davis's credibility by arguing that Davis's testimony was illogical in that defendant never held a gun outstretched as contended by Davis, otherwise Davis would have flagged down some police

officers who were driving by at the time. Hence, counsel clearly cast doubt on Davis's credibility.¹

Finally, defendant argues he was denied the effective assistance of counsel when defense counsel failed to argue the adverse inferences that could be drawn from the victim's failure to assist the police in locating Frenchy. The record also contradicts this claim. Defense counsel requested an adverse instruction several times throughout the course of the trial, thereby alerting the trial court of the adverse inferences it could draw from Frenchy's absence.²

Defendant also seeks reversal on the basis that the trial court erred in finding that the prosecution exercised due diligence in its efforts to locate and serve a known *res gestae* witness, Frenchy. Defendant further argues that the trial court should have considered the "missing witness" instruction because the prosecution failed to exercise due diligence.

A prosecutor who endorses a witness under MCL 767.40a(3) is obliged to exercise due diligence to produce that witness at trial. *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). The failure to produce an endorsed witness may be excused if the prosecutor can show that the witness could not be produced despite the exercise of due diligence. *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000). The test for due diligence "is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).

However, if the prosecutor did not exercise due diligence in producing the missing witness, the trier of fact may infer that the missing witness's testimony would have been unfavorable to the prosecution's case and read the missing witness jury instruction. CJI2d 5.12; *People v Snider*, 239 Mich App 393, 422; 608 NW2d 502 (2000).

As noted, the prosecution endorsed Frenchy as a *res gestae* witness under MCL 767.40a(3). Although the prosecution was unable to locate Frenchy, the trial court found that it had exercised due diligence in its attempts to produce him at trial. The prosecutor attempted to locate and produce Frenchy by first contacting, without success, Investigator Greene on December 7, 2005, and then again on January 12, 2006 and January 18, 2006. In addition, the prosecution subpoenaed and wrote the victim a letter on December 21, 2005, to determine the whereabouts of Frenchy. The morning of trial, Investigator Greene finally contacted Frenchy. Frenchy agreed to come to court and testify that afternoon. Investigator Greene arranged to pick Frenchy up at a specified location; however, Frenchy failed to show up. At trial, Davis admitted to knowing how to find Frenchy but Davis apparently avoided the prosecution's phone calls after testifying at trial and refused to cooperate in locating Frenchy.

¹The record contradicts defendant's claim that his counsel proceeded without a theory of his defense. Quite simply, the defense theory was that the incident, as described by Davis, never happened.

² Defense counsel requested the court consider the adverse instruction on January 20, 2006 after Davis's testimony and again on January 27, 2006, upon resting the defense's case.

We are in agreement with the trial court that the prosecution made reasonable and diligent good-faith efforts to procure Frenchy's testimony at trial, and therefore plain error is not present. Moreover, defendant has not shown how Frenchy's testimony would have helped the outcome of his case or by what other means the prosecution could have procured Frenchy's testimony.

Finally, because the trial court properly found that the prosecutor exercised due diligence in locating Frenchy, the trial court did not err when it declined to utilize the missing witness jury instruction. *Eccles, supra* at 388-389.

Affirmed.

/s/ Helene N. White
/s/ Henry William Saad
/s/ Christopher M. Murray